TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 904

FOSTER CLINE, AS DISTRICT ATTORNEY FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, APPELLANT,

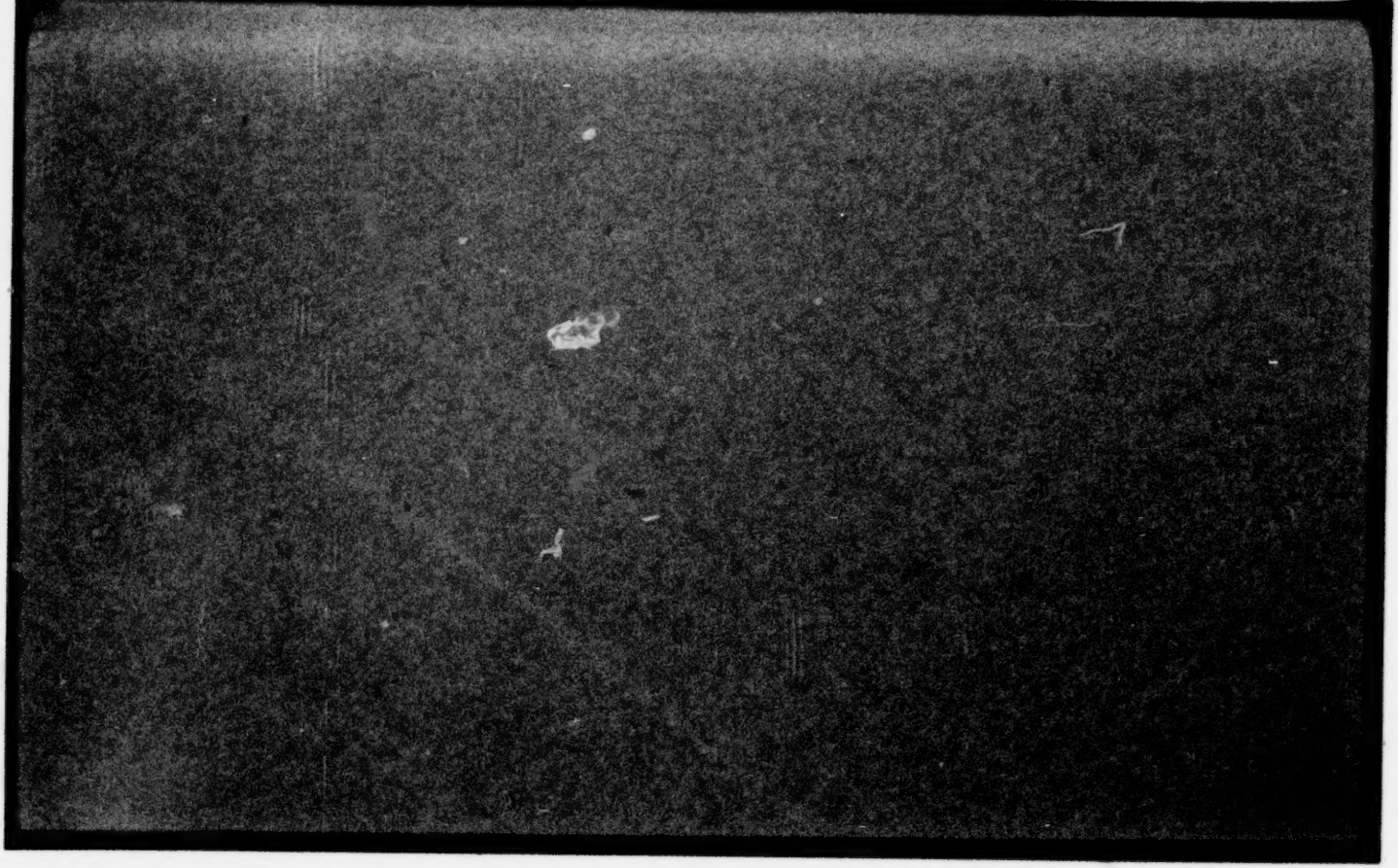
vs.

FRENK DAIRY COMPANY, THE WINDSOR FARM DAIRY COMPANY, THE CLIMAX DAIRY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

FILED FEBRUARY 21, 1927

(31,719)



(31,719)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 304

FOSTER CLINE, AS DISTRICT ATTORNEY FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, APPELLANT,

vs.

FRINK DAIRY COMPANY, THE WINDSOR FARM DAIRY COMPANY, THE CLIMAX DAIRY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1926

[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

FRINK DAIRY COMPANY, a Corporation; THE WINDSOR FARM Dairy Company, a Corporation; The Climax Dairy Company, a Corporation; H. Brown Cannon, Clarence Frink, A. T. McClintock, and Morris Robinson, Plaintiffs,

vs.

FOSTER CLINE, as District Attorney for the City and County of Denver, State of Colorado, Defendant

BILL OF COMPLAINT—Filed October 29, 1925

Come now the plaintiffs above named, and for cause of action against the defendant, allege:

I

That the plaintiffs, Frink Dairy Company, The Windsor Farm Dairy Company and the Climax Dairy Company, are each and all corporations duly organized and existing under and by virtue of the laws of the State of Colorado; that said corporations and H. Brown Cannon, Clarence Frink, A. T. McClintock and Morris Robinson are each and all citizens and residents of the State of Colorado.

II

That the defendant, Foster Cline, is the duly elected, [fol. 3] qualified and acting District Attorney of the City and County of Denver, State of Colorado, and at all times with respect to which he is hereinafter mentioned was and is now, a resident and citizen of the City and County of Denver, State of Colorado.

III

That this suit is of a civil nature and in equity; that the matter or amount in controversy herein as affects each

of the plaintiffs separately and not jointly, exclusive of interest and costs, exceeds exclusive of interest and costs the sum or value of Three Thousand Dollars ($3,000); that said suit arises under the Constitution of the United States, in this: This suit necessarily involves and presents for decision the question of the validity under the Constitution of the United States of an Act of the Legislature of the State of Colorado, approved April 7, 1913, being Chapter 161 of the Session Laws of the State of Colorado for 1913, entitled—"An Act defining and prohibiting trusts; providing procedure to enforce the provisions of this Act, and penalties for violations of the provisions of this Act," said Act being commonly known and referred to as the "Colorado Anti-Trust Act;" that if said Act be enforced against the plaintiffs, or either of them, as it undoubtedly will be unless its enforcement is herein enjoined by this Honorable Court, such enforcement will necessarily and [fol. 4] certainly entail a loss and damage to each and every of the plaintiffs greatly in excess of the sum of Three Thousand Dollars ($3,000), exclusive of interest and costs, and would entail numerous prosecutions of the plaintiffs and each of them thereunder, causing a multiplicity of suits and prosecutions and a possible imposition upon the plaintiffs and each of them of penalties and fines greatly in excess of said sum, as is hereinafter more fully set forth.

IV

That plaintiffs, The Windsor Farm Dairy Company, Frink Dairy Company and The Climax Dairy Company each have been for a number of years, and now are, conducting large and varied businesses in the State of Colorado, dealing in and distributing milk, butter and all manner of milk products; that each of said named plaintiffs has invested in their respective businesses large sums of money in excess of the sum of One Hundred Thousand Dollars ($100,000) each; that their principal business is conducted in the City and County of Denver and surrounding territory. Plaintiffs likewise are engaged in interstate commerce, buying and selling from without the limits of the State of Colorado; that plaintiff H. Brown Cannon is a large stockholder of The Windsor Farm Dairy Company, owning stock therein of a value in excess of One Hundred

Thousand Dollars ($100,000), is the President of said corporation, and is actively engaged in and known as a dairy-
[fol. 5] man affiliated with that particular line of business; that plaintiff Clarence Frink is an officer of the Frink Dairy Company, owns stock therein of a value largely in excess of the sum of Ten Thousand Dollars ($10,000), and is actively engaged in the dairy business and is known and reputed in the community as an experienced dairyman; that plaintiff Morris Robinson is a large stockholder and an officer of The Climax Dairy Company, owning stock in value far in excess of the sum of Ten Thousand Dollars ($10,000), is actively engaged in the dairy business and is known and reputed in the community as an experienced dairyman; that plaintiff A. T. McClintock is an officer and stockholder of the Beatrice Creamery Company, owning and holding stock therein in value far in excess of the sum of Ten Thousand Dollars ($10,000), is an experienced dairyman by profession and known in the community as such.

V

That during the many years in which the plaintiffs and each of them have been doing business in the State of Colorado, they and each of them have by painstaking effort, fair dealing and careful management gained thousands of customers, a large and numerous individual patronage and developed a well established trade and in addition to their tangible property and assets herein mentioned they and each of them have developed, and now possess, a good will of great value, constituting one of their most valuable
[fol. 6] assets and to them and each of them of a value far in excess of the sum of Three Thousand Dollars ($3,000), separately and not collectively; that all of said property and good will may be lost to the plaintiffs and each of them, as hereinafter set forth, unless the plaintiffs and each of them be given the relief herein sought.

VI

That Chapter 161 of the Session Laws of the State of Colorado for 1913, provides as follows:

"Be it Enacted by the General Assembly of the State of Colorado:

Section 1. A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or by any two or more of them, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

Second. To increase or reduce the price of merchandise produce or commodities.

Third. To prevent competition in the manufacture, making transportation, sale or purchase of merchandise, produce, ores, or commodities, or to prevent competition in aids of commerce.

Fourth. To fix any standard of figures, whereby the price to the public of any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State, shall, in any manner, be controlled or established.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind them [fol. 7] selves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and other so as to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity or by which they shall agree so to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit

or to market at a reasonable profit those products which cannot otherwise be so marketed: provided further that it shall not be deemed to be unlawful or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; and provided further that labor, whether skilled or unskilled, is not a commodity within the meaning of this act.

Section 2. It shall be lawful to enter into agreements or form associations or combinations, the purpose and effect of which shall be to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.

Section 3. For the violation of any of the provisions of this act by any corporation, or by any of its officers or [fol. 8] agents mentioned herein, it shall be the duty of the attorney general of this State, or district attorney of any district in which said violation may occur, or either of them, upon his own motion to institute an action in any court in this State having jurisdiction thereof, for the forfeiture of the charter, rights and franchise of such corporation, and the dissolution of its existence.

Section 4. Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises or functions of a corporation in this state, violating any of the provisions of this Act, is hereby denied the right and prohibited from doing any business in this State, and it shall be the duty of the Attorney General to enforce this provision by bringing proper proceedings by injunction or otherwise.

Section 5. Each and every person, company or corporation, the officers, agents or representatives thereof, violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not more than one thousand dollars, or to imprisonment for not more than six months; and it shall be the duty of the Attorney General of the State, or the district attorney of any district in the State, in which said

violation shall occur, or either of them, to prosecute and enforce the provisions of this act.

Section 6. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this State; and when any civil action shall be commenced in any court of this State it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the provisions of this act.

Section 7. That any person, firm, company or corporation that may be damaged by any such agreement, trust or combination described in Section 1 of this act, may sue for and recover in any court of competent jurisdiction in this State, of any person, company or corporation operating [fol. 9] such trust or combination, such damages as may have been thereby sustained.

Section 8. In any proceeding pending in any court of record brought or prosecuted by the Attorney General, or any district attorney, for the violation of any of the provisions of this act, no person shall be excused from attending, testifying or producing books, papers, schedules, contracts, agreements or any other document, in obedience to the subpoena or under the order of such court, or any commissioner or referee appointed by said court to take testimony, or any notary public or other person or officer authorized by the laws of this state to take depositions when the orders made by such court, or judge thereof, included a witness whose deposition is being taken before such notary public or other officer, on the ground or for the reason that the testimony or evidence required of him may tend to criminate him or subject him to any penalty; but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, before any such court, person or officer."

That said Act at all times since its passage has been and is now, wholly void and ineffective, for the following reasons to wit:

(1) It violates Article XIV of the amendments to the Constitution of the United States of America in that said

Act deprives the plaintiffs of their liberty without due process of law; in that it is indefinite and uncertain and fails to fix any standard of criminality, and fails to define with reasonable certainty what combinations or agreements are unlawful, and leaves to speculation and surmise the deter- [fol. 10] mination of what profits are reasonable or unreasonable, and what agreements come within its prohibition, and for the further reason that said Act delegates legislative powers to a court or jury in the determination of what constitutes the offense and what combinations or agreements come within its provisions, so that no one at the time of the doing of the act or thing which forms the basis of the charge, can by any possibility determine whether or not he is violating said Act; and for the further reason that cruel and unusual penalties are to be and will be imposed upon the plaintiffs, who, acting without intent to do wrong, and with the honest intention and purpose to do right and to comply strictly with the requirements of said Act, will be subjected to the imposition of excessive fines and the possible forfeiture of right to do business in the State of Colorado, with the resultant loss of principal invested, established business and good will belonging to the plaintiffs.

(2) It violates Article XIV of the amendments to the Constitution of the United States of America in that said Act denies to plaintiffs the equal protection of the laws in that said Act exempts from its operation persons and corporations engaged in the business of selling or manufacturing commodities of a similar or like character, who employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodi- [fol. 11] ties; that said exemption is unjust, discriminatory and arbitrary, and deprives plaintiffs of their rights and property without due process of law.

(3) It violates Article XIV of the amendments of the Constitution of the United States of America, in that said Act denies to plaintiffs the equal protection of the laws in that said Act exempts labor from its operation, and that said exemption is unjust, discriminatory and arbitrary and deprives plaintiffs of their rights and property without due process of law.

(4) That said Act is in violation of Section 16 of Article II of the Constitution of the State of Colorado, popularly known as "Bill of Rights", in that it fails to define the nature and cause of the accusation *with* may be made thereunder, and fails to fix any standard of criminality, and fails to inform the plaintiffs, or anyone engaged in business, as to what combinations or agreements come within its prohibition.

(5) That said Act is in violation of Section 25 of Article II of the Constitution of the State of Colorado in that it deprives plaintiffs of their liberty and property without due process of law; in that it is indefinite and uncertain and fails to fix any standard of criminality, and fails to define with reasonable certainty what profits are reasonable or unreasonable, and what combinations are unlawful, and leaves to speculation, conjecture and surmise the determina-
[fol. 12] tion of what agreements or associations come within its prohibition; and for the further reason that said Act delegates legislative powers to a court or jury in the determination of what constitutes the offense and what combinations or agreements come within its prohibition; and for the further reason that cruel and unusual penalties are to be and will be imposed upon the plaintiff, who, acting without intent to do wrong, and with the honest effort to do right and to comply strictly with the requirements of said Act, will be subjected to the imposition of excessive fines and the possible forfeiture of right to do business in the State of Colorado, with the resultant loss of capital invested, established business and good will belonging to the plaintiffs.

(6) That said Act is in violation of Article III of the Constitution of the State of Colorado in that it unlawfully delegates to the judicial department of the government the powers properly belonging to the legislative department; that in and by said Act the legislative department has not itself established or defined what combinations or agreement are illegal or what profits are reasonable and has not set a standard or basis for the ascertainment of what is a reasonable profit, but attempted in said Act to delegate to the judicial department the right and power in each particular case and, by necessarily varying tests and standards,

the determination of whether a particular deed or trans-
[fol. 13] action comes within the prohibition of the Act.

VII

That the plaintiffs and each of them in carrying on their respective business of buying, selling and distributing milk in the City and County of Denver, and in order to intelligently conduct operations and to obtain accurate information as to the essential elements of the economics of the milk and its allied product distributing business, and in order to obtain wider and more scientific knowledge of the conditions affecting such business, it is necessary and desirable that plaintiffs and those so engaged should meet and exchange ideas, information and statistics, with reference to such business, local conditions and factors entering into the conduct of such business, and this for the mutual benefit of themselves and their patrons and customers. Plaintiffs and each of them believe, and so charge the fact to be, that such meetings and discussions would violate no valid law but is a right and privilege granted to them by the Constitution of the United States.

VIII

Plaintiffs allege that they dare not meet, either collectively or discuss with two or more parties similarly engaged, nor discuss with the farmers who are also the producers of milk, the things and matters hereinabove set forth for fear that at some subsequent time it will be contended that such conduct is in violation of the provisions
[fol. 14] of the Colorado Anti Trust Law hereinbefore set forth.

IX

Plaintiffs charge that in fact the defendant herein, Foster Cline, in his capacity as District Attorney for the City and County of Denver, State of Colorado, has been, and still is, claiming, asserting and charging that the plaintiffs and their competitors have been, and now are, acting in violation of said Anti Trust Act and have conspired and are conspiring to violate said Act. Deeming it his duty so to do under the provisions of said Act, he has caused an informa-

tion to be filed in the criminal division of the District Court of the City and County of Denver, in which the plaintiffs and the Beatrice Creamery Company, a Delaware corporation, are charged with a conspiracy to violate said Anti-Trust Act, said case being numbered 28320, Div. VI of said District Court, and being entitled "The People of the State of Colorado vs. H. Brown Cannon, The Windsor Farm Dairy Company, a corporation, Clarence Frink, Frink Dairy Company, a corporation, A. T. McClintock, Beatrice Creamery Company, a corporation, Morris Robinson, and the Climax Dairy Company, a corporation, defendants;" that the plaintiffs and each of them upon being arraigned pleaded not guilty thereto and said cause has been set for trial on November 9, 1925; that said defendant Cline will press the case to trial and has announced that he expects to try said case on said date unless enjoined by this Honorable Court.

[fol. 15]

X

That since said case was instituted, the Grand Jury has been, and now is, in session in the City and County of Denver, State of Colorado, and the defendant Cline has been, and now is, summoning various witnesses before said Grand Jury and questioning them about plaintiff's milk business; that said defendant has threatened, and unless restrained by this Honorable Court, will institute further prosecutions, file further informations and attempt to procure indictments of the plaintiffs by the Grand Jury for alleged violation of said Anti-Trust Act, and unless prevented, will press such prosecutions under said Act to final conclusion; that said activities of the defendant Cline constitute a constant threat and menace to the business of the plaintiffs, and that plaintiffs' reputation, good will and business are seriously injured and irreparably and immeasurably damaged by the publicity and resulting public odium which are necessarily attendant upon such activities.

XI

That the existence of said Anti-Trust Act upon the Statutes of the State of Colorado is a constant and continuing threat and menace to the business of plaintiffs and each of them, their property and property rights; that by the terms

of Section 3 thereof the duty is imposed upon the defendant in his capacity as such District Attorney to institute proceedings for the forfeiture of the charter, rights and fran-
[fol. 16] chises of such corporations and the dissolution of their existence, who have violated any of the terms of said Act; that plaintiffs herein are fearful and apprehensive that the defendant will, and he has threatened so to do, institute proceedings to forfeit the charters, rights and franchises and to dissolve the business of plaintiffs The Windsor Farm Dairy Company, Frink Dairy Company and the Climax Dairy Company.

XII

That plaintiffs, and other persons in similar business, cannot conduct the milk business without making investigations and gathering information from the public, from dairymen, and all available sources, as to the essential factors and elements entering into said business, and what its competitors are doing, for the reason that said business, which is highly competitive, requires scientific and accurate knowledge and information of all the economic problems entering into the production and distribution of milk; that by reason of the uncertainty of said Anti-Trust Law, plaintiffs dare not meet with or talk to their competitors or the producers of milk or discuss the problems of the industry without fear that someone else, viewing the matter at a later date, will reach the conclusion that they, no matter how conscientious they may have been in their efforts to comply with the law, have violated said Act and subject themselves to severe and unusual punishment.

[fol. 17]

XIII

That by reason of the facts as herein averred and set forth, the plaintiffs, nor either of them, have any plain, speedy or adequate remedy at law, and they and each of them, are wholly without remedy except the equitable remedy herein prayed.

Wherefore, plaintiffs pray:

First. That defendant be required to answer this bill, but not under oath, answering under oath being herein expressly waived.

Second. That a preliminary or interlocutory injunction be issued herein, to remain in full force and effect until a final hearing herein, prohibiting the defendant Cline, his agents, deputies and representatives, from enforcing or attempting to enforce against the plaintiffs, their officers or agents, said Anti Trust Act, and from taking any further steps in the prosecution of the trial of the plaintiffs, or either of them, in case No. 28320, Div. VI, in the District Court of the City and County of Denver, and from prosecuting or attempting to prosecute, institute or attempt to institute, any prosecution against the plaintiffs, or either of them, their officers or agents, under said Act, and from attempting to take any further steps with respect to the plaintiffs, their officers or agents, under and by virtue of any right or authority claimed to exist by reason of said Act, or any part thereof; and that, upon final hearing, said [fols. 18-21] injunction be made permanent.

Third. That this Honorable Court decree Chapter 161 of the Session Laws of the State of Colorado for 1913 to be wholly invalid, void and of no effect as against plaintiffs and all others similarly situated.

Fourth. That plaintiffs have their costs of suit, and such other and further relief as to the court may seem proper and fit.

Wilbur F. Denious, Hudson Moore, Simon J. Heller, R. D. Hawley, A. J. Fowler, Ernest B. Fowler, Attorneys for Plaintiffs.

Duly sworn to by H. Brown Cannon. Jurat omitted in printing.

[fol. 22] [File endorsement omitted]

In United States District Court

[Title omitted]

Motion to Dismiss—Filed November 2, 1925

Comes now Foster Cline, defendant in the above entitled cause, and moves the Court to dismiss the bill of complaint filed in this cause, for the reason that said bill of complaint

does not state any matter of equity entitling the plaintiffs [fol. 23] to the relief prayed for, nor are the facts as stated therein sufficient to entitle plaintiffs to any relief against this defendant.

Wherefore, defendant prays the judgment of this Court whether he shall further answer and that he shall be dismissed with his costs.

Foster Cline, District Attorney, Second Judicial District, State of Colorado, pro. se. A. L. Betke, Assistant District Attorney, Second Judicial District, State of Colorado; Paul M. Segal, Deputy District Attorney, Second Judicial District, State of Colorado; Harold Clark Thompson, Deputy District Attorney, Second Judicial District, State of Colorado; Wm. L. Boatright, Attorney General of the State of Colorado; Charles Roach, Deputy Attorney General of the State of Colorado; Jean S. Breitenstein, Assistant Attorney General of the State of Colorado, Solicitors for Defendant Above Named.

[fol. 24] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT — Filed November 4, 1925

Come now the above named plaintiffs and by leave of the Court first had and obtained amend their complaint in the following particulars, to wit:

First. By adding to the ninth paragraph of said complaint the following:

That said information embraces five counts and in each and every one of them the plaintiffs herein are charged with conspiring and unlawfully and injuriously devising [fol. 25] and designing and attempting to fix and control the price of milk and milk products in violation of the said "Anti Trust Statute." A copy of said information will unto this Honorable Court be exhibited.

Second. That the Honorable Charles C. Sackman, the Judge presiding in said District Court, City and County of Denver, has over-ruled and denied the unconstitutionality of said Statute and has refused to hear further arguments thereon, and has refused to give to defendants an opportunity of presenting the question as to the application of the "Marketing Act of 1923" of the Session Laws of the State of Colorado; that under said procedure plaintiffs are not permitted to appeal to the Supreme Court for a review of such decision until after the case has been heard and disposed of and tried to a jury; that to compel these plaintiffs to try the case to a jury upon its merits will entail upon them a vexatious burden; it will cause them to produce an exhibit in Court of all their private records and documents, trade methods, trade secrets, and methods of conducting business, the prices they are required to pay for products, the wages paid to their employees. Further, it will expose them to public ridicule, contempt, injure them in their good name, destroy the business, and alienate the customers that they have heretofore been able to serve with satisfaction, to the irremediable damage of the plaintiffs and each of them.

[fol. 26] Wherefore plaintiff prays that this amendment be allowed.

Wilbur F. Denious, Hudson Moore, R. D. Hawley, Fowler & Fowler, Simon J. Heller, Attys. for Plff.

Duly sworn to by H. Brown Cannon. Jurat omitted in printing.

[fol. 27] [File endorsement omitted]

In United States District Court

[Title omitted]

Amendment to Bill or Complaint—Filed November 4, 1925

Come now the plaintiffs in the above stated case and by leave of the Court first had and obtained, amend their bill of complaint as herein filed, and for cause of amendment allege:

1. By adding to the third section of paragraph VI, as found on page 9 of the complaint, the following:

And further because it violates Article XIV of the amendments of the Constitution of the United States of America in that said act denies to plaintiffs the equal pro- [fol. 28] tection of the laws in that said act as amended by Chapter 141 and Chapter 142 of the Session Laws of 1923 of the State of Colorado, and as construed by the Supreme Court of the State of Colorado, exempts persons engaged in the production of agricultural products and dealers in agricultural products from its provisions and that said exemption is unjust, discriminatory and arbitrary and deprives plaintiffs of their rights and property without due process of law.

2. By adding prayer number 5, as follows:

Fifth. That the defendant be enjoined and restrained from instituting any action and from taking any action whatsoever having for its purpose the forfeiture of the charter or charters, rights and franchises, of plaintiff corporations, herein.

Wilbur F. Denious, Hudson Moore, Fowler & Fowler, Simon J. Heller, R. D. Hawley, Attorneys for Plaintiffs.

Duly sworn to by H. Brown Cannon. Jurat omitted in printing.

[fol. 29] [File endorsement omitted]

In United States District Court

[Title omitted]

[fol. 30] Affidavit of Clarence Frink. Filed November 4, 1925

Before me, the undersigned, an officer authorized by law to administer oaths, personally appeared Clarence Frink, of lawful age, who, being first duly sworn upon oath, deposes and says:

I am one of the plaintiffs in the above entitled cause. I have resided in the State of Colorado for more than 30

years, and during all of that period have been engaged in the general dairy business, which said business is my principal business. I am Vice President and General Manager of the Plaintiff Frink Dairy Company, a corporation, and own stock in said corporation of an actual value in excess of Twenty Thousand Dollars ($20,000). Frink Dairy Company is a corporation organized and existing under and by virtue of the laws of the State of Colorado, and is actively engaged in buying, selling, treating, and manufacturing milk and milk products and distributing the same, and said Company has invested in the State of Colorado in plants, property, and equipment in excess of One Hundred and Twenty-five Thousand Dollars ($125,000).

Said Frink Dairy Company, by painstaking effort, fair dealing, and careful management has built up a substantial [fol. 31] business and has acquired thousands of customers and patrons, and its established business, trade, and good will has a value far in excess of the sum of Three Thousand Dollars ($3,000).

There is attached to the affidavit of H. Brown Cannon, filed in this case as "Exhibit A," a copy of "Information for Conspiracy to Violate the Anti Trust Law," which said exhibit is identical in form and in the same words and figures as a like copy of the same information served upon this affiant by the Clerk of the District Court in and for the City and County of Denver, in case No. 28320 pending in said Court, said "Exhibit A" is hereby made a part hereof by reference to the terms thereof; that in addition to said pending action, the above named defendant has stated that it is his purpose and intention to institute other prosecutions under the so-called Anti Trust Act of the State of Colorado and to take action to forfeit the charter of Frink Dairy Company.

That the business of Frink Dairy Company involves the sale of a large volume of milk and milk products in small lots at a small percentage of profit, and that said business brings the said company into contact with the residents of the City and County of Denver by supplying to said residents at their homes necessary foodstuffs and essential foods for children, and that because of such relationship it is essential that defendant Frink Dairy Company, if it is to be successful in this business, have and hold the good

will of its said customers and patrons which it for many years has enjoyed, and be held in high regard for its hon-
[fol. 32] esty and fair dealing by them; that such actions as the above mentioned case No. 28320, now pending in the District Court of the City and County of Denver and or actions threatened by defendant under the criminal statutes of Colorado above mentioned, whether successful or not, have had the effect, and will continue to have the effect, of destroying the good will of Frink Dairy Company, bringing it into disrepute, driving away its customers, greatly diminishing the amount of its business, and threatening its very life and existence, to the great damage of said Frink Dairy Company in the sum of many thousands of dollars and in excess of the sum of Three Thousand Dollars ($3,000) and causing irreparable damage and loss to it and its stockholders. That the aforementioned case No. 28320, pending in the District Court of the City and County of Denver has already caused the plaintiff Frink Dairy Company substantial damage and loss, in that since the institution of said action and during the month of September, 1925, the gross sales of said plaintiff Frink Dairy Company were in amount Six Thousand Eighty Nine Dollars and Thirty cents ($6,089.30) less than in the preceding month of August, 1925, and that the business of said plaintiff Frink Dairy Company was conducted during the month of September, 1925, at an actual loss of $2,500.76; that while the books of said plaintiff Frink Dairy Company have not been audited for the month of October, 1925, affiant believes and therefore alleges, that the business of said Company was conducted during said month at a loss
[fol. 33] fully as large, if not larger, than the loss sustained in the month of September, 1925; that the effect of said action upon the drivers and salesmen of plaintiff Frink Dairy Company has been to subject them to continual criticism and harrassment by their customers and the residents of the community, and, as a result, the efficiency of said employes has been greatly lessened, and they have been unable to render to their employer the full measure of service of which they would otherwise have been capable, and have been unable to secure new and additional business for said Frink Dairy Company or to hold and maintain the business which said Company had and enjoyed prior

to the institution of the aforesaid action, all of which has damaged said Frink Dairy Company in a sum greatly in excess of the sum of Three Thousand Dollars ($3,000) and will continue to damage said Frink Dairy Company in an amount considerably in excess of the sum of Three Thousand Dollars ($3,000) if said action and further contemplated actions be not enjoined by this court.

Affiant is a stockholder of said Frink Dairy Company, owning stock therein in excess of Twenty Thousand Dollars ($20,000); that the aforesaid action and contemplated threatened actions on the part of defendant herein have already lessened the value of said stock, and if said actions are continued their effect will be to lessen and eventually to destroy the value of said stock, and whether [fol. 34] said prosecutions are successful or unsuccessful, if continued, they will in that respect damage this deponent in the sum of more than Twenty Thousand Dollars ($20,000) and considerably more than the sum of Three Thousand Dollars ($3,000).

Deponent by said actions, instituted and threatened, has been held up to contempt and ridicule, and by the continuation of said prosecutions and the institution of other actions threatened and contemplated by the defendant, will continue to be brought into contempt and ridicule before the public and his good name and reputation injured and destroyed. In this respect unless the defendant is enjoined from other actions under color of the statute of the State of Colorado commonly known as the Anti-Trust Act, Deponent's character will be besmirched, his reputation and good name destroyed and he will be damaged in a sum in excess of Twenty Five Thousand Dollars ($25,000), or other large sums, for all of which said damage deponent herein will be without remedy of recourse and said damage irreparable.

Deponent herein is an experienced dairyman and is the active managing officer in the employ of said Frink Dairy Company. His services as such officer and employee are worth to said corporation, and said corporation is paying to deponent for said services, the sum of Three Thousand Six Hundred ($3,600) per year. Said business in which deponent is engaged is one of the common occupations of life.

[fol. 35] That in view of the provisions of the so-called Anti-Trust Act of the State of Colorado, as set forth in the Bill of Complaint herein, deponent is unable to pursue his business and calling in a free and unhampered manner; he is unable to render to his employer the full measure of service which he would be able to render in the absence of said statute. He dare not confer or converse with competitors and or the producers of milk with reference to the economics, statistics, and other essential matters entering into the economic conduct of the dairy and milk business. He is unable to determine, and his counsel are unable to inform him, just what he may or may not do in pursuit of his calling and business without violating the terms of said Anti Trust Statute. That if said statute is held to be a valid and enforceable law, this deponent can not in the future follow his calling and business in a free and unhampered manner. He will not be able to render to his employer the full measure of service to which it is entitled and which it otherwise would receive in the absence of the provisions of said statute. That the services which he can, and will, be able to render to said employer in the absence of said statute will be worth many thousands of dollars per year to his said employer more than the services which he is able to render in view of the provisions of said statute. That in view of the terms of said statute, Frink Dairy Company will not, and will not be able, to pay this [fol. 36] deponent for future services anything approaching the amount which deponent now receives, and that if said statute is to remain in force and effect deponent's earning capacity will be decreased thereby in a sum not less than Three Thousand Dollars ($3,000) per annum, to the irreparable injury and damage of this deponent, and deponent will have no redress therefor.

Further deponent saith not.

Clarence Frink.

Subscribed and sworn to before me this 2nd day of November, A. D. 1925. Hazel M. Costello, Notary Public, commissioned and qualified to act in and for the city and county of Denver, State of Colorado. My commission expires February 14, 1927. (Notarial Seal.)

[File endorsement omitted]

In United States District Court

[fol. 37] [Title omitted]

Affidavit of Simon J. Heller—Filed November 4, 1925

United States of America,
State of Colorado,
City and County of Denver, ss:

Simon J. Heller, being first duly sworn on oath, deposes and says: That he is the attorney for The Climax Dairy Company a corporation and Morris Robinson, parties plaintiff in the above entitled cause and also attorney for the said The Climax Dairy Company and Morris Robinson, defendants, in case No. 28520, wherein The People of the State of Colorado is plaintiff and the said Morris Robinson and The Climax Dairy Company, among others, are defendants which suit is pending before the Hon. Charles C. Sackman, one of the Judges of the District Court of the City and County of Denver, State of Colorado, sitting in Division VI thereof; that on the 23rd day of October, 1925, affiant became aware of certain decisions whereby he was of the opinion that the so called Anti-Trust Law of Colorado as contained in Chapter 161 of the Session Laws of 1913 of said State, was unconstitutional; that affiant's opinion that the same was unconstitutional was based primarily upon the decision of the Supreme Court of the United States in the case of United States vs. L. Cohen [fol. 38] Grocery Company, 255 U. S. 81; that thereupon and on said date, affiant called on the Hon. Charles C. Sackman in his Chambers in Division VI of the District Court of the City and County of Denver; that affiant informed Judge Sackman that since the hearing of the Motion to Quash the Information in the case pending before him, the decision of the United States Supreme Court as aforesaid had been called to affiant's attention, and affiant was of the opinion that the Anti-Trust Act was unconstitutional; affiant requested Judge Sackman to grant leave to affiant's clients and the other defendants to present further argument why the Order theretofore entered overruling the Motion to Quash, should be vacated and a further hearing

had, and the Motion sustained; or that leave be granted to file a second and further Motion to Quash urging as the ground therefor the fact that the said Anti-Trust Act is unconstitutional and that the clients of the affiant as well as the other defendants in the suit pending before the said Judge Sackman should not be required to stand trial under an Information based on an unconstitutional act; the affiant thereupon submitted to the said Judge Sackman the decision of the Supreme Court of the United States in the above mentioned case; that Judge Sackman stated to affiant that he would read the case, consider the matter, and advise affiant the following Monday whether he would grant affiant's request; that Judge Sackman expressed himself as being unwilling to take the responsibility of de- [fol. 39] claring the act unconstitutional; that during the same conversation affiant informed Judge Sackman that it was the intention of the affiant, as well as of the other attorneys representing the other defendants in the case pending in Judge Sackman's Court, to file a Bill of Complaint in Equity against Foster Cline as District Attorney, to enjoin the further prosecution of the said case, if the said Judge Sackman should refuse to hear the matter further; that thereupon the said Judge Sackman stated that it would please him if the Federal Court would take jurisdiction and decide the issue as to the constitutionality of the said Anti-Trust Act; that thereupon affiant left Judge Sackman with the understanding that Judge Sackman would give a final expression of his views the following Monday.

That thereafter and on to wit, the 26th day of October, 1925 affiant called Judge Sackman on the telephone to obtain his views and expression relating to the conversation had by affiant with Judge Sackman on the 23rd day of October, 1925; that Judge Sackman informed affiant that he did not care to grant affiant leave to reopen the hearing on the Motion to Quash or file another Motion to Quash nor to hear further argument thereon, and that he would rather that the Federal Court decide the question; that immediately after receiving said statement and expression from said Judge Sackman as aforesaid, this affiant advised [fol. 40] the attorneys for the other plaintiffs herein as well as the attorneys for the Beatrice Creamery Company that Judge Sackman had expressed himself as aforesaid; and

thereupon and thereafter the Bill in Equity was filed by the Beatrice Creamery Company and the Bill herein filed by the plaintiffs herein.

Simon J. Heller.

Subscribed and sworn to before me this 3rd day of November, A. D. 1925. My commission expires ——, ——. My Commission expires October 30, 1927. Noah Atler, Notary Public. (Notarial Seal.)

[File endorsement omitted]

In United States District Court

[fol. 41] [Title omitted]

Affidavit of A. T. McClintock—Filed November 4, 1925

Before me, the undersigned, an officer authorized by law to administer oaths, personally appeared A. T. McClintock, of lawful age, who, being first duly sworn upon oath, deposes and says:

That I am one of the plaintiffs in the above entitled case; that I have resided in the City and County of Denver, State of Colorado, for fifteen years; that I have been the manager of Beatrice Creamery Company for the State of Colorado for fifteen years, and have during all of that time been actively engaged in the creamery business, the buying and selling of milk and milk products, and have by virtue of said business and experience, become an experienced dairyman; that I am also the Vice President and Manager for Colorado for Beatrice Creamery Company, a corporation, plaintiff in case No. 7986 in this court; that I own stock [fol. 42] of said Beatrice Creamery Company of an actual market value in excess of $30,000; that Beatrice Creamery Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is authorized to do business in the State of Colorado by virtue of full compliance with the laws of the State of Colorado.

That said company is actively engaged in the production and distribution of milk and milk products, and is now,

and has been for many years, conducting a large and varied business in the State of Colorado, consisting of the manufacture, sale and distribution of ice, the furnishing of cold storage, the manufacture of butter, and the distribution of milk and milk products, including buttermilk and buttermilk powder, sweet cream, and has invested in the State of Colorado, in plant, property and equipment, more than $200,000.00.

That by painstaking effort and careful management, said Beatrice Creamery Company has gained thousands of customers and developed a well established trade, and has developed and now possesses a good will worth many thousands of dollars in value, far in excess of the sum of $3,000.00.

That deponent and Beatrice Creamery Company are defendants in the case of The People vs. H. Brown Cannon, et al., being No. 28320 pending in the District Court of the City and County of Denver, State of Colorado.

That in addition to said pending action, defendant in this [fol. 43] above entitled case has stated that, as District Attorney, it is his purpose and intention to institute other proceedings and prosecutions and to take action to forfeit the charter of Beatrice Creamery Company; that such actions taken, and or threatened, whether successful or not, have had the effect, and will continue to have the effect of destroying the good will of Beatrice Creamery Company and deponent, bringing Beatrice Creamery Company and deponent into disrepute driving away customers, and threatening the very life and existence of Beatrice Creamery Company, and causing irreparable and immeasureable damage to Beatrice Creamery Company and its stockholders.

That deponent is employed upon a salary in excess of $3,000.00 by Beatrice Creamery Company, and also receives from Beatrice Creamery Company a percentage of the net profits earned in the State of Colorado by said Beatrice Creamery Company; that the said action of defendant in instituting and urging said case to trial, and in threatening further and additional contemplated actions in the future has already greatly lessened the value of the good will of Beatrice Creamery Company; and has injured and lessened the value of the stock of plaintiff in Beatrice

Creamery Company, and has directly affected the earnings which deponent will receive for his services as Manager of Beatrice Creamery Company in the State of Colorado, and if said Acts are continued by defendant as District Attorney, the value of said stock of Beatrice [fol. 44] Creamery Company, and of the stock held by deponent, will be further depreciated.

Deponent says that the actions of defendant as District Attorney has held up deponent to contempt and ridicule and has affected his good name and reputation in the community, and that the threatened activities of defendant in the future will injuriously effect the good name and reputation of deponent and will seriously interfere with his right to earn a livelihood and continue in the employ of Beatrice Creamery Company unmolested by efforts of defendant as District Attorney to enforce said Anti-Trust law of Colorado, and deprives him of his right to carry on his business free from the restraint of said act, for all of which damages deponent will be without remedy or recourse, and said damages will be immeasurable and irreparable.

That in view of the so-called Anti-Trust Act of the State of Colorado, as set forth in the bill of complaint herein, deponent is unable to pursue his business and calling in a free and unhampered manner; he is deprived of his right to earn a livelihood and continue in the employ of Beatrice Creamery Company unmolested by said enactment, and cannot carry on his ordinary occupation without being restrained by said Anti-Trust law; that deponent by virtue of the above mentioned acts of defendant as District Attorney, is forced to devote a large portion of his time to the defense of himself against the charges and claims made [fol. 45] by the District Attorney, to the manifest injury of the business of Beatrice Creamery Company, and to the detriment of the earnings which he may receive as Manager for the State of Colorado, and is not able to render to Beatrice Creamery Company the full measure of service which he would be able to render in the absence of said statute and the activities of defendant; he dare not confer or converse with his competitors or farmers or producers of milk with reference to the economics and other essential matters entering into the conduct of the dairy and milk business; he is unable to determine, nor are his counsel able

to inform him, just what he may or may not do in the pursuit of his calling or business, without violating the terms of said Anti-Trust statute; that if said statute is held to be valid and enforceable, this deponent cannot in the future follow his business and calling in a free and unhampered manner; that the services which he would be able to render to Beatrice Creamery Company in the absence of said statute will be worth many thousands of dollars per year to said Beatrice Creamery Company and to deponent; that in view of the terms of said statute, Beatrice Creamery Company cannot pay to deponent for future services anything approaching the amount which deponent now receives, and if said statute is to remain in force and effect, deponent's earning capacity will be decreased thereby in excess of $3,000.00 per annum, to the irreparable injury and damage of this deponent, and for which deponent will have no redress.

[fol. 46] Further deponent saith not.

A. T. McClintock.

Subscribed and sworn to before me this 2nd day of November A. D. 1925. My commission expires April 16th, 1928. May Plemmons, Notary Public. (Notarial Seal.)

[File endorsement omitted]

In United States District Court

[Title omitted]

[fol. 47] Affidavit of H. Brown Cannon—Filed November 4, 1925

Before me, the undersigned, an officer authorized by law to administer oaths, personally appeared H. Brown Cannon, of lawful age, who being first duly sworn, upon oath deposes and says:

I am one of the plaintiffs in the above stated case. I have resided in the City and County of Denver, State of

Colorado, for Thirty-eight years. I am an experienced dairyman and have been engaged in the dairy business for the past thirty-eight years. I am also President of the plaintiff The Windsor Farm Dairy Company a corporation, and own stock in said corporation of an actual value in excess of One Hundred Thousand Dollars ($100,000). The Windsor Farm Dairy Company is a corporation organized and existing under and by virtue of the laws of the State of Colorado and is actively engaged in the production and distribution of milk and all of its allied products and has invested in the State of Colorado in plants, property and equipment far in excess of a quarter of a million dollars in value. The said The Windsor Farm Dairy Company is likewise engaged in interstate commerce, in buying, selling and shipping to points from without the State of Colorado to points within the State and from points within the State of Colorado to points without the State and in other states of the Union. The said corpora-
[fol. 48] tion by painstaking effort, fair dealing and careful management has thousands of customers and patrons, a well established business and trade and a good will of many thousands of dollars in value far in excess of the sum of Three Thousand Dollars ($3,000).

Deponent attaches hereto, as Exhibit A, copy of Information for Conspiracy to Violate Anti-Trust Laws, served upon him by the Clerk of the District Court in case No. 28320 pending in the District Court of the City and County of Denver. That in addition to said pending action, the defendant in the above stated case has stated that it is his purpose and intention to institute other prosecutions and to take action to forfeit the charter of The Windsor Farm Dairy Company; that such actions taken and or threatened, whether successful or not, have had the effect, and will continue to have the effect, of destroying the good will of the Windsor Farm Dairy Company bringing it into disrepute, driving away its customers, greatly diminishing the amount of its business and threatening its very life and existence, to the great damage of the said The Windsor Farm Dairy Company in the sum of many hundreds of thousands of dollars and causing irreparable damage and loss to it and its stockholders. Deponent is a stockholder of the said The Windsor Farm Dairy Company, owning

stock therein in excess of One Hundred Thousand Dollars ($100,000) that said action and contemplated threatened actions on the part of the defendant herein have already [fol. 49] lessened the value of said stock, and if continued will lessen and eventually destroy the value of said stock, and whether said prosecutions are successful or unsuccessful would in that respect damage this deponent in the sum of more than Twenty-five Thousand Dollars ($25,000).

Deponent by said actions instituted and threatened has been held up to contempt and ridicule and by the continuation of said prosecutions and the institution of other actions threatened and contemplated by the defendant will continue to be brought into contempt and ridicule before the public and his good name and reputation injured and destroyed, and in this respect unless the defendant is enjoined from further actions under color of the statute of the State of Colorado known as the Anti-Trust Act his character will be besmirched, his reputation and good name destroyed and he will be damaged in a sum in excess of Twenty-five Thousand Dollars ($25,000) or other large sum, for all of which damages deponent herein will be without remedy or recourse and said damages irreparable.

Deponent herein is an experienced dairyman. He is the active managing officer in the employ of the said The Windsor Farm Dairy Company. His services as such officer and employee are worth to said corporation and said corporation is paying to deponent for such services the sum of Fifteen Thousand dollars ($15,000.00) per year. Said business in which deponent is engaged is one of the common occupations of life.

[fol. 50] That in view of the provisions of the so-called Anti-Trust Act of the State of Colorado, as set forth in the Bill of Complaint herein, deponent is unable to pursue his business and calling in a free and unhampered manner. He is not able to render to his employer the full measure of services which he would be able to render in the absence of said statute. He dare not confer or converse with competitors and or farmer producers with reference to the economics, statistics and other essential matters entering into the economical conduct of the dairy and milk business. He is unable to determine, nor are his counsel able to inform him, just what he may or may not do in the pursuit of

his calling and business without violating the terms of said Anti-Trust Statute. That if said Statute is held to be a valid and enforcible law, this deponent cannot in future follow his calling and business in a free and unhampered manner. He will not be able to render to his employer the full measure of service to which it is entitled and which it otherwise would receive in the absence of the provisions of said Statute. That the services which he can and will be able to render to said employer in the absence of said Statute will be worth many thousands of dollars per year to his said employer more than the services which he is able to render in view of the provisions of said Statute. That in view of the terms of said Statute The Windsor Farm Dairy Company will not and cannot pay to this deponent [fols. 51-60] for future services anything approaching the amount which deponent now receives, and that if said Statute is to remain in force and effect deponent's earning capacity will be decreased thereby in a sum not less than Three Thousand Dollars ($3,000) per annum, to the irreparable injury and damage of this deponent, and deponent will have no redress therefor.

Further deponent saith not.

H. Brown Cannon.

Subscribed and sworn to before me this thirty-first day of October, 1925. My commission expires May 8, 1927. Helen R. Herian, Notary Public. (Notarial Seal.)

[fol. 61] [File endorsement omitted]

In United States District Court

[Title omitted]

Affidavit of Morris Robinson—Filed November 4, 1925

United States of America,
State of Colorado,
City and County of Denver, ss.

Morris Robinson, being first duly sworn on oath deposes and says: That he is one of the plaintiffs above named; that he has resided in the State of Colorado for thirty-two

years last past; that he is the President of The Climax Dairy Company, a Colorado corporation, one of the plaintiffs [fol. 62] herein and has during all of that time been actively engaged in the creamery business and in the buying and selling of milk products; and by virtue of the said business and experience has become and now is an experienced dairyman; that affiant has been the President of The Climax Dairy Company during the past twelve (12) years; that he now owns stock in the said Company of an actual value in excess of Seventy Five Thousand ($75,000.00) Dollars; that the said The Climax Dairy Company is actively engaged in the production and distribution of milk and milk products and is now and has been for many years past conducting a large and varied business in the State of Colorado consisting of the manufacture, sale and distribution of butter, milk and milk products, ice cream and eggs and has invested in the State of Colorado in plants, property and equipment more than the sum of One Hundred Thousand ($100,000.00) Dollars.

That by painstaking effort and careful management the said The Climax Dairy Company has gained hundreds of customers and developed a well established trade and has developed and does now possess a good name and a good will worth many thousands of dollars in value and far in excess of the sum of Three Thousand ($3,000.00) Dollars.

That the affiant and The Climax Dairy Company are defendants in the case of People vs. H. Brown Cannon, et al., being No. 28329, pending in the District Court of the City [fol. 63] and County of Denver, State of Colorado.

That in addition to said pending action the defendant herein as District Attorney has stated that it is his purpose and intention to institute other proceedings and prosecutions and to take action to forfeit the charter of The Climax Dairy Company; that such actions taken, and or whether successful or not, have had the effect and will continue to have the effect of destroying the good name and good will of The Climax Dairy Company and of the affiant, bringing The Climax Dairy Company and affiant into disrepute, driving away customers and threatening the very life and existence of The Climax Dairy Company and causing irreparable and immeasurable damage to the affiant, to The Climax Dairy Company and to its stockholders; that as a result of the said prosecution of the said case in the District Court of the

City and County of Denver, various newspaper articles have appeared holding up affiant and The Climax Dairy Company to public condemnation, disrepute, contempt and ridicule, as will be more fully seen from an inspection of the said newspaper articles which are hereto attached and hereby made a part hereof.

That affiant is employed at a salary in excess of Seven Thousand ($7,000.00) Dollars per year; that the said action of the defendant in instituting and urging said case to trial, and in threatening further and additional contemplated actions in the future has lessened the value of the business [fol. 64] of The Climax Dairy Company and will directly affect the earnings of the said Company and the earnings which the affiant will receive for his services as President of the said Company; and if said acts are continued by defendant as District Attorney, the value of the holdings of the affiant in the said Company will be further depreciated and whether the said prosecutions and threatened prosecutions successful or not, would damage this affiant in the sum of more than Twenty Five Thousand ($25,000.00) Dollars.

Affiant says that the actions of defendant as District Attorney has held up affiant to contempt and ridicule and has affected his good name and reputation in the community, and that the threatened activities of the defendant in the future will injuriously affect the good name and reputation of the affiant and will seriously interfere with his ability to earn a livelihood and continue in the employ of The Climax Dairy Company unmolested by the efforts of the Defendant as District Attorney to enforce said Anti Trust Law of Colorado and deprive affiant of his right to carry on his business free from the restraint of the said act, for all of which damages affiant will be without remedy or recourse and the said damages will be immeasurable and irreparable.

That in view of the so-called Anti-Trust Act of the State of Colorado, as set forth in the bill of complaint herein, affiant is unable to pursue his business and calling in a free [fol. 65] and unhampered manner; he is deprived of his right to earn a livelihood and continue in the employ of The Climax Dairy Company unmolested by said enactment, and cannot carry on his ordinary occupation without being restrained by said Anti-Trust Law; that affiant by virtue of

the above mentioned acts of defendant as District Attorney, is forced to devote a large portion of his time to the defense of himself against the charges and claims made by the District Attorney, to the manifest injury of the business of The Climax Dairy Company, and to the detriment of the earnings which he may receive as President of said Company, and is not able to render to said Company the full measure of service which he would be able to render in the absence of said statute and the activities of defendant; he dare not confer or converse with his competitors or farmers or producers of milk with reference to the economies and other essential matters entering into the conduct of the dairy and milk business; he is unable to determine, nor are his counsel able to inform him, just what he may or may not do in the pursuit of his calling or business, without violating the terms of said Anti Trust statute; that if said statute is held to be valid and enforceable, this affiant cannot in the future follow his business and calling in a free and unhampered manner; that the services which he would be able to render to The Climax Dairy Company in the absence of said statute will be worth many thousands of dollars per year to said The Climax Dairy Company and to [fols. 66-118] affiant; that in view of the terms of said statute, The Climax Dairy Company cannot pay to affiant for future services anything approaching the amount which affiant now receives, and if said statute is to remain in force and effect, affiant's earning capacity will be decreased thereby in excess of Three Thousand ($3,000.00) Dollars per annum, to the irreparable injury and damage of this affiant, and for which affiant will have no redress.

Further affiant saith not.

Morris H. Robinson.

Subscribed and sworn to before me this 3rd day of November, A. D. 1925. My commission expires ——— —, ———. My commission expires October 30, 1927. Noah Adler, Notary Public. (Notarial Seal)

[fol. 119] In United States District Court

[Title omitted]

Order Granting Interlocutory Injunction—November 14, 1925

This cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, It is Ordered, Adjudged and Decreed, as follows:

That Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Compiled Laws, Colorado, 1921, Sections 4066-44, is unconstitutional and void as being violative of Art. XIV of the amendments to the Constitution of the United States, in accordance with opinion filed herein.

It is, therefore, ordered, adjudged and decreed that the writ of interlocutory injunction issue, enjoining defendant [fol. 120] Foster Cline, as District Attorney, for the City and County of Denver, State of Colorado, his deputies, agents and successors, from prosecuting or instituting against the plaintiffs herein, or any of them, any proceedings for the enforcement of said law, and from prosecuting or instituting any proceedings against the plaintiffs, or any of them, for the violation of, or conspiracy to violate, said act, or any part thereof, and from attempting to enforce against the plaintiffs or any of them, any of the remedies or penalties of said act, or any part thereof, and he is enjoined from taking any further action in the prosecution or trial of that certain criminal proceeding pending in the District Court City and County of Denver, State of Colorado, being No. 28329, Div. VI of said Court, styled The People of the State of Colorado, vs. H. Brown Cannon, et al., and being entitled "Information for conspiracy to Violate Anti-Trust Laws."

The Clerk of this Court is ordered and directed to issue the writ in conformity herewith.

[fol. 121] In United States District Court

[Title omitted]

Final Decree—December 14, 1925

This cause came on to be heard at this term, and the defendant in error having elected to stand upon his motion to dismiss and refusing to plead further, and parties hereto having stipulated in open court that we might consider as evidence the affidavits and documents of file and considered by us upon the hearing for an interlocutory injunction, and we being of the opinion and having reached the conclusion [fols. 122-125] that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Compiled Laws of Colorado, 1921, and in Secs. 4036 to 4043, inclusive thereof, is unconstitutional and void as being violative of Article XIV of the Amendments to the Constitution of the United States in accordance with our written opinion as filed herein:

It is therefore, ordered, adjudged and decreed that the prayers of plaintiffs are granted and that the writ of permanent injunction issue perpetually enjoining defendant Foster Cline as District Attorney for the City and County of Denver, State of Colorado, his deputies, assistants, agents and successors from continuing the prosecution and from instituting against the plaintiffs herein, or any of them, any proceedings whatsoever for the enforcement of said law and from instituting or prosecuting any proceedings against the plaintiffs, or any of them, for the violation of or conspiracy to violate said act, or any part thereof, and from attempting to enforce in any manner against the plaintiffs, or any of them any of the remedies or penalties of said act, or any part thereof.

Plaintiffs may have judgment for their costs in this matter expended. The Clerk of this Court is ordered and directed to issue the writ in conformity herewith. Defendant saves exceptions.

[fol. 126] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL FILED JANUARY 9, 1926, AND ORDER ALLOWING SAME

To the Honorable J. Foster Symes, Judge of the District Court of the United States for the District of Colorado:

[fol. 127] The above named defendant, feeling himself aggrieved by the decree made and entered in this cause on the fourteenth day of December, A. D. 1925, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the Assignments of Error, which are filed herewith, and for the further reason that in this suit a final decree has been entered granting a permanent injunction suspending the enforcement of a statute of the State of Colorado; and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

J. P. O'Connell, A. L. Bethe, Paul M. Segal, Harold C. Thompson, Solicitors for the Defendant.

[fol. 128] The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of five hundred dollars.

J. Foster Symes, Judge of the District Court of the United States for the District of Colorado.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 9, 1926

[fol. 129] Comes now the appellant and alleges that the final decree entered by the Court below in the above cause is erroneous and unjust to the appellant in this, viz:

I

The Court erred in making and entering a decree granting an injunction against the further prosecution by the appellant, his deputies, assistants and successors of a criminal case then pending in the district court of the Second Judicial District of the State of Colorado, and which had been pending in said Colorado court at the time of the institution of this suit by the complainants herein.

II

The Court erred in making and entering a decree granting an injunction against the taking of further steps in the prosecution by the appellant, his deputies, assistants, and successors, in the district court of the Second Judicial District of the State of Colorado, of case No. 28320, Division VI, in said Colorado Court, wherein the People of the State of Colorado are plaintiff, and the complainants herein are among the defendants, said criminal case being then pending at the time of the institution of this suit by the complainants herein.

[fol. 130] III

The Court erred in assuming jurisdiction to enjoin the prosecution of a suit then pending in a court of the State of Colorado.

IV

The Court erred in assuming jurisdiction to enjoin the prosecution of a suit in a court of the State of Colorado which was pending at the time this suit was instituted by the complainants herein.

V

The Court erred in assuming jurisdiction to interfere by injunction with the prosecution and further prosecution by the appellant herein of case No. 28320, Division VI, in the District Court of the Second Judicial District of the State of Colorado (a court of the state of Colorado), in which case the People of the State of Colorado were plaintiff and the complainants herein were among the defendants, and which case was pending at the time of the commencement of this suit by complainants herein.

VI

The Court erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Sections 4036 to 4043 inclusive of the Compiled Laws of Colorado of 1921 is unconstitutional and void.

[fol. 131]

VII

The Court erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Sections 4036 to 4043 inclusive of the Compiled Laws of Colorado of 1921 is unconstitutional and void as being in violation of Article XIV of the Amendments to the Constitution of the United States.

VIII

The Court erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913 was rendered unconstitutional and void by the enactment of Chapter 141 of the Session Laws of the State of Colorado for the year 1923.

IX

The Court erred in holding and adjudging that Chapter 141 of the Session Laws of Colorado for the year 1923 created an exception to the operation of Chapter 161 of the Session Laws of the State of Colorado for the year 1913 and that such exception was unconstitutional as being in

violation of Article XIV of the Amendments to the Constitution of the United States, and rendered unconstitutional the said Chapter 161 of the Session Laws of the State of Colorado for the year 1913.

[fol. 132-139] Wherefore, appellant prays that the decree of the Court below be reversed.

Joseph P. O'Connell, Joseph P. O'Connell, A. L. Betke, A. L. Betke, Paul M. Segal, Paul M. Segal, Harold C. Thompson, Harold C. Thompson, Wm. L. Boatright, William L. Boatright, Attorney General; Charles Roach, Charles Roach, Deputy Attorney General; Jean S. Breitenstein, Jean S. Breitenstein, Assistant Attorney General, Solicitors for Appellant.

[fol. 140] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Lewis, Circuit Judge, and Kennedy and Symes, District Judges

OPINION—Filed November 14, 1925

[fol. 141] LEWIS, Circuit Judge, delivered the opinion of the court:

These are suits to enjoin the enforcement of an Act of the Colorado General Assembly approved April 7, 1913, Session Laws 1913, p. 613, commonly known as the Colorado Anti-Trust Act, on the alleged ground that it is in conflict with the Fourteenth Amendment to the Constitution of the United States, in denying to plaintiffs equal protection of the laws and, if enforced will deprive plaintiffs of their property without due process. A corporation is within the protection of those clauses of the amendment, Covington & L. Co. v. Sandford, 164 U. S. 578. The Beatrice Creamery Company is alleged to be a corporate citizen and resident of the State of Delaware. The three corporations in the other case were organized under the

laws of Colorado, and the four individual plaintiffs in that case are stockholders, directors and officers of one or of the other of the four corporations named, and are respectively in charge of the management of said corporations, all of which are engaged in the purchase, sale and distribution of milk and dairy products at Denver and other places in Colorado. They each have large investments in property in Denver, one at Pueblo, also necessary for the transaction of their business in supplying their customers with milk and milk products. The defendant Cline is the District Attorney for the Second Judicial District of the State and it is made his duty to institute and prosecute [fol. 142] criminal cases for offenses against the laws of the State within that district.

After stating the jurisdictional amount of the matter in controversy and that the suits arise under the Constitution of the United States, it is alleged in each complaint that defendant, acting under the provisions and requirements of said Anti-Trust Act, filed an Information in the criminal division of said District Court in which plaintiffs are charged with a conspiracy to violate said Anti-Trust Act, that plaintiffs were arraigned, plead not guilty, and the case has been set down for trial. A copy of the Information, attached to an affidavit in support of the bill, has been exhibited. It charges the four corporations and the four individuals who appear here as plaintiffs with the same conspiracy in five different counts, to unlawfully fix and control the price of milk and milk products, each count stating the charge in different form, to comply with the varying terms of the definitions given by the Act of an unlawful conspiracy. The Information was filed on August 22, 1925, and these bills were brought, one on October 27 and one on October 29, 1926. The Act, in its definition of unlawful trusts and combinations, is in the usual terms of such legislation. It prohibits and makes unlawful a combination of two or more persons or corporations for the purpose of creating or carrying out any restrictions in trade or commerce, the prevention of competition in the manufacture, making, transportation, sale or purchase of [fol. 143] merchandise, produce or other commodities, the fixing of any standard of figures whereby the price to the public of any article or commodity of merchandise, produce

or commerce intended for sale, use or consumption in this State shall, in any manner, be controlled or established, the making or entering into any contract or agreement of any kind, by which the parties shall bind themselves not to sell, manufacture, dispose of or transport any article or commodity below a common standard figure, or to keep the price of such article commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or of transportation between themselves or between themselves and others, so as to preclude a free and unrestricted competition, or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity so that its price may be in any manner affected. Following the definitions of the unlawful trusts and combinations which the Act prohibits it continues:

"And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further that it shall not be deemed to be unlawful, or [fol. 144] within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; and provided further that labor whether skilled or unskilled, is not a commodity within the meaning of this act."

The Act makes it the duty of the Attorney General of the State and of the District Attorney of any district in which a violation of any of the provisions of the Act by a corporation or any of its officers or agents occurs, to institute an action in any court of the State having jurisdiction, for the forfeiture of the charter, rights and franchise of such corporation and its dissolution. A violation of the Act prohibits the corporation from doing any further business in

the State and subjects the corporation, its officers and agents to prosecution as for a misdemeanor, and on conviction to fine and imprisonment. It provides that any contract or agreement in violation of any of the provisions of the Act shall be absolutely void and not enforcible in any of the courts of the State, and that when any civil action shall be commenced in any court of the State it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the Act.

[fol. 145] The complaints allege that the defendant threatens to file other criminal informations charging plaintiffs with other violations of the Act, and to institute proceedings to forfeit the charters of the corporate plaintiffs and to oust them from transacting any further business in the State, and if not restrained he will proceed to do so. They charge that the institution and pendency of the Information in the State court, the publicity that has been given to it and the avowed purpose of the defendant to institute other proceedings, civil and criminal against plaintiffs have been a constant threat and menace to the business of the plaintiffs, that plaintiffs' good will and business, which they had built up through many years of labor and effort, have been and will continue to be seriously injured and irreparably damaged because thereof and because of the publicity which has been and will continue to be attendant upon such activities of the defendant. Affidavits in support of the bills show that plaintiffs have already suffered damages in large amounts from loss of business due to the defendant's filing the Information and his threats to institute other civil and criminal proceedings under the Act and that the individual plaintiffs have suffered and will continue to suffer financial loss through depreciation of their stock holdings in the corporations, each in excess of three thousand dollars.

The main point of contention is over the question of the [fol. 146] validity of the State Anti-Trust Act. If that Act is not in conflict with the Fourteenth Amendment the plaintiffs have no case. The first proviso in the paragraph above quoted from the Act is relied on by plaintiffs' counsel as rendering the whole Act void because of the rule announced by the Supreme Court in United States v. Cohen Grocery

Co., 255 U. S. 81; International Harvester Co. v. Kentucky, 234 U. S. 216; and other like cases; it being argued that the only combinations denounced by the Act are those which may be formed for the purpose of conducting business at an unreasonable profit, and that the Act affords no measure by which it can be determined what profits are reasonable and what are not reasonable. We are not willing to now so construe either of the provisos quoted. The whole Act and all kinds of prosecutions under it, civil and criminal, are challenged. It defines and prohibits combinations which may operate as restrictions on trade, which in no way deal with the subject of prices of commodities or the profits to be realized on the sale thereof. It was so construed by the Colorado Supreme Court in Campbell v. People, 72 Colo. 213. In that case the conviction was on a charge that the unlawful agreement between the defendants, who constituted an association of master plumbers, was that none but members in good standing of a named local union could be employed by the defendants. The court said:

"We do not agree that the sole purpose of the Act was to prevent a restriction of dealing in commodities, but think that it was also to prevent the restriction of competition [fol. 147] and the attainment of the control of a business, i. e. monopoly."

Many well known methods can be resorted to by those in combination to restrict or destroy competition and affect prices and profits by indirection—the division of territory between them, and other well known methods. Neither in the Campbell case nor in Johnson v. People, 72 Colo. 218, and People v. Apostolos, 73 Colo. 71, in all of which convictions under the Anti Trust Act were sustained, did the Supreme Court consider the constitutionality of the Act. The two last cases referred to dealt with combinations to increase prices. But we take those rulings of the Supreme Court as an implied conclusion on its part that the Act was valid as the law of the State then stood. The last of those opinions was rendered on March 5, 1923.

We come now to consider another ground on which the Act is said to be invalid. On March 30, 1923, what is known as "The Co-operative Marketing Act" was passed by the

Colorado General Assembly and approved by the Governor with an emergency clause. Session Laws 1923, p. 420. It provides that eleven or more persons, a majority of whom are residents of this State, engaged in the production of agricultural products, may form a non-profit co-operative association, with or without capital stock. It defines the term "agricultural products" as including horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products; that the powers of such association shall be [fol. 148] to engage in any activity connected with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products brought or delivered to it by its members, or the manufacturing or marketing of the by-products thereof, or in any activity connected with the purchase, hiring or use by its members of supplies, machinery or equipment, or in the financing of any such activities, and it may in its articles assume the right to handle the products of non-members, but, in such event, the association shall not handle for non-members a volume of products greater in the aggregate than the aggregate of products handled by it for its own members; such associations are given the right to act as agents of its members in any of said activities; to do everything conducive to or expedient for the interests or benefit of the association and to contract accordingly; to admit as members only those engaged in the production of agricultural products to be handled by or through the association; to issue certificates of membership to its members; to make marketing contracts between the association and its members requiring the members to sell, for any period of time not over ten years, all or any specified part of their agricultural products or commodities exclusively to or through the association, or any facilities to be created by the association; to make by-laws fixing a specific sum as liquidated dam- [fol. 149] ages to be paid by a member to the association upon breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; it provides that any two or more associations may unite in using, or may separately use the same persons, methods, means and agencies for carrying on and conducting their business; and then, actuated by knowledge of the

real character of the organizations which the Act authorizes, its sections 22 and 29 read thus:

(22) "Any provisions of law which are in conflict with this Act shall be construed as not applying to the associations herein provided for";

(29) "No association organized hereunder and complying with the terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monoply; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose."

Nothing can be plainer than that these combinations authorized through the formation of the associations as provided for in the Act would, in fact, be combinations in restraint of trade and an attempt to lessen competition in the marketing of agricultural products. A declaration that they should not be so considered is as futile as a statement that white is black. Of course, we do not pretend to say that the legislature did not have the power to exempt such [fol. 150] combinations from prosecution and dissolution as unlawful common law or statutory trusts. That was entirely a matter for its consideration. In a decision by the State Supreme Court, rendered on October 19, 1925, and not yet reported, this Act was sustained. That court, in answering the contention that such an association was in restraint of trade and void under the Colorado Anti-Trust Law said:

"It is objected that the contract is in restraint of trade and so void under the Colorado Anti-Trust Law, C. L. 1921, Secs. 4036-4044, but the Act of 1923, being the later Act controls the earlier."

There can be no doubt that the later Act exempted the associations which it authorized from the penalties and restrictions of the earlier Act. The Supreme Court of the United States, in Connolly v. Union Sewer Pipe Co., 184 U. S. 540

had under consideration an Act of the legislature of the State of Illinois defining unlawful combinations, very much in the same terms as the Colorado Act of 1913, the ninth section of which reads thus:

"The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

and the question there, as here, was whether the Sewer Pipe Company in disposing of its products while a member of a prohibited combination, was under the Act denied equal protection of the laws. In disposing of the question that court said:

[fol. 151] "A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not evade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another or favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. • • •

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it

may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural produces and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the [fol. 152] statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? * * * We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

We reach a like conclusion as to the Colorado Anti-Trust Act.

The District Attorney, and the Attorney General of the State, who also made argument and submitted brief, do not deny that it is the duty of the court, on the facts stated, to grant the writ enjoining the institution of further court proceedings, civil and criminal if we hold the Anti-Trust Act to be unconstitutional; but it is earnestly and ably argued by the District Attorney that the court is without right to direct the issuance of its writ against him staying

[fol. 153] further prosecution of plaintiffs on the Information that had been filed prior to the institution of these suits. On consideration of the contention of the District Attorney we think a fact not heretofore stated is of great importance. It is this: The pleadings here and affidavits in support disclose that the State District Judge overruled motions to quash the Information, declined to hear further argument from defendants' counsel in that case on the unconstitutionality of the State Anti-Trust Act, and has set that case down for trial at an early date. Under the State practice defendants in a criminal case cannot be heard in the State Supreme Court until after conviction, and the removal of their case to that court after the happening of that event, and putting it in condition to be finally heard there, requires time, frequently extended by unexpected delays. We are further informed by the proof that the record in that case will necessarily be voluminous. The four corporate defendants are jointly charged; their books and records will become competent proof in arriving at the question as to what are reasonable prices and profits for their products, which will involve a full investigation of the business of each company and require expert testimony. Such a record cannot be put in shape for the appelate court until after the lapse of many months. In the meantime the Act prohibits them from transacting any business in the State of Colorado. A verdict of guilty will be conclusive proof that they have violated the State Anti-Trust Act. It will [fol. 154] also be conclusive proof in a suit to forfeit their rights and franchises and dissolve them, and a good defense in actions they may bring against their debtors. Under the charges made in the bills it therefore seems clear that further prosecution of the pending Information is but a step in the invasion of their property rights, and if continued those rights will be wholly destroyed under an invalid law. It is a general principle well understood that a court of equity has no jurisdiction over the prosecution and punishment of crimes, and ordinarily will not sustain a bill to restrain or relieve against proceedings of that kind. In re Sawyer, 124 U. S. 200; Harkrader v. Wadley, 172 U. S. 148; Ex parte Young, 209 U. S. 123. There are, however, well established exceptions to this rule. The writ will be granted to stay the institution of criminal proceedings by a party to the cause, that would put in issue the

same right which is in issue in the pending cause; the writ will also issue to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law. It is the latter exception with which we are now concerned. We think there will be invasion of property rights, even destruction of them, if the pending prosecution is permitted to continue under this unconstitutional statute; and in that condition of the case there can be no difference in principle whether the criminal proceedings are instituted before or after the bill was filed. We think the Supreme [fol. 155] Court has so ruled in Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207. There the criminal prosecution was started first, and in answer to the argument based on that fact it was said:

"It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding. Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, 558."

In the case there cited with approval the vice-chancellor said:

(p. 558:) "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate destruction of property, or make it less valuable or comfortable for use or occupation."

We find no contrary ruling to that made in the Davis & Farnum cases. The subject has received general comment in several late cases, but the particular question we have was not discussed. Philadelphia v. Stimson, 223 U. S. 605; Truax v. Raich, 239 U. S. 33; Kennington v. Palmer, 255 U. S. 100; Terrace v. Thompson, 263 U. S. 197; Packard v. Banton, 264 U. S. 140; Hygrade Provision Co. v. Sherman 266 U. S. 497. In most of these cases the legislation under consideration was sustained as valid, the prosecutions were only threatened, not pending, and there was no occasion to determine the point now in mind, it was not

passed on. Where a criminal prosecution results directly [fol. 156] in the invasion and destruction of property rights, we do not doubt that it is within the power and duty of a court of equity to enjoin the administrative officer who has charge of the prosecution if there be no valid law on which the accusation rests. The claimed difference, under those conditions, between pending and threatened cases is, in our judgment, without substance. We venture to say, on the authority of the Davis & Farnum case, that it can make no difference, on the question of jurisdiction when prosecution is begun under an invalid law, whether before or after a bill is exhibited, if there be an unlawful invasion by virtue thereof of property rights.

A temporary writ of injunction as prayed may issue in each case. The defendant may answer as he is advised.

[File endorsement omitted]

[fol. 157] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed November 14, 1925

SYMES, D. J.:

This case as it now stands presents two questions for consideration. First, whether the act in question violates the Constitution of the United States for any of the reasons set up in the bill and, Secondly, if the act is unconstitutional, should this Court grant an injunction restraining the defendant from prosecuting the suit already instituted in the State court?

After reviewing all the authorities cited, and such others [fol. 158] as I have thought pertinent to the issues involved, I prepared a somewhat lengthy memorandum as a basis for discussion in conference. But as I am in accord with the majority opinion in most of the conclusions announced, I do not believe it necessary to do more at this time than to state very briefly the reasons why I regret I cannot agree with the Court on the second point.

First, I am of the opinion that the statute in question is unconstitutional and void, for the reasons stated in the majority opinion.

Second, In re Sawyer, 124 U. S. 200; Fitts v. McGhee, 172 U. S. 516; Ex parte Young, 209 U. S. 123, and the numerous cases citing and affirming these three, down to and including Hygrade Provision Company v. Sherman, 266 U. S. 497, lay down the general rule that the Federal courts have the right to proceed without interference, when they first assume jurisdiction in a suit involving the unconstitutionality of a state act, such as in the case at bar, and to that end may restrain all proceedings, civil or criminal in the state courts thereafter brought, and may restrain a state officer from acting under an unconstitutional act, as the state law affords him no protection, such suit in the Federal Court not being one against the state. But I find no clear case in the Supreme Court holding that the Federal courts can restrain criminal proceedings already pending in the state court, brought under an un-[fol. 159] constitutional state law, where the defendants can raise the Federal questions, with the right to an appeal to the highest court of the state, and then to the Supreme Court of the United States in turn. I am of the opinion that the clear language of the three cases referred to above specifically prohibit such action.

Davis & Farnum v. Los Angeles, 189 U. S. 207, is cited in the cases heretofore discussed, and approves In re Sawyer and Fitts v. McGhee. The language on p. 218 might be said to authorize an injunction against criminal proceedings already pending, but granting this, I do not think it overcomes the great weight of authority, both before and after this case, which states the rule otherwise. For instance, In re Young, a later case, says specifically, p. 162:

"But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court."

In conclusion, I am of the opinion that proceedings of any nature threatened to be brought under this act against these defendants should be restrained, but that the injunction asked for to prevent the defendant from proceed-

ing further in the suit now pending in the state court should be denied.

November 14, 1925.

[fol. 160] Clerk's certificate to foregoing opinions omitted in printing.

[fol. 161] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Appellant of Parts of the Record to be Printed, with Proof of Service.—Filed February 24, 1926

Comes now the appellant above named, by his attorneys and files this his statement of the points upon which he intends to rely in his appeal of the above cause to this Court, and his statement of the parts of the record which he deems necessary for the consideration thereof, viz:

The points upon which he intends to rely are as follows:

I

The Court below erred in making and entering a decree granting an injunction against the further prosecution by the appellant, his deputies, assistants and successors in the [fol. 162] District Court of the Second Judicial District of the State of Colorado of Case No. 28329, Division 6 in said Court wherein the People of the State of Colorado are plaintiff, and the complainants herein are among the defendants, said criminal case being then pending in said Court and having been pending at the time of the institution in the Court below of this suit by the complainants herein.

II

The Court below erred in assuming jurisdiction to enjoin the prosecution of a suit in a Court of the State of Colorado which was pending at the time this suit was instituted in the Court below by the complainants herein.

III

The Court below erred in assuming jurisdiction to interfere by injunction with the prosecution by the appellant

herein of Case No. 28320, Division 6 of the District Court of the Second Judicial District of the State of Colorado, in which case the People of the State of Colorado were plaintiff and the complainants herein were among the defendants, and which case was pending at the time of the commencement of this suit by complainants herein.

IV

The Court below erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Sections 4036 to 4043 inclusive of the Compiled Laws of Colorado of 1921 is unconstitutional and void.

V

[fol. 163] The Court below erred in holding and adjudging that Chapter 161 of the Session Laws of the State of Colorado for the year 1913, being embraced in Sections 4036 to 4043 inclusive of the Compiled Laws of Colorado of 1921 is unconstitutional and void, as being in violation of Article XIV of the Amendments to the Constitution of the United States.

VI

The Court below erred in holding and adjudging that Chapter 141 of the Session Laws of Colorado for the year 1923 created an exception to the operation of Chapter 161 of the Session Laws of the State of Colorado for the year 1913 and that such exception was unconstitutional as being in violation of Article XIV of the Amendments to the Constitution of the United States, and rendered unconstitutional the said Chapter 161 of the Session Laws of the State of Colorado for the year 1913.

The parts of the record which the appellant deems necessary for the proper consideration of this appeal are as follows:

1. The bill of complaint
2. Motion to dismiss
3. First Amendment to the complaint
4. Second amendment to the complaint

5. Order of Court Granting Interlocutory Injunction
6. Election of defendant to stand upon motion to dismiss and refusal to plead further.
7. Final decree
8. Assignments of error.

[fol. 164] Dated this twentieth day of February, 1926.

Wm. L. Boatwright, Attorney General; Charles Roach, Deputy Attorney General; Jean S. Breitenstein, Assistant Attorney General; Joseph P. O'Connell, A. L. Betke, Paul M. Segal, Harold Clark Thompson, Attorneys for Appellant.

We, the undersigned, hereby acknowledge that we and each of us have this twentieth day of February A. D. 1926, received a copy of the foregoing statement of the appellant of the points upon which he intends to rely and of the portions of the record which he deems necessary for the proper consideration of the appeal in the foregoing complaint.

Robert D. Hawley, by H. M. Costello, Wilbur F. Dennous, Hudson Moore, A. J. Fowler, Ernest R. Fowler, Simon J. Heller, Attorneys for Appellees.

[fol. 165] [File endorsement omitted.]

[fol. 166] In Supreme Court of the United States

Designation by Appellees of Additional Parts of the Record to be Printed—Filed March 2, 1926

Come now the appellees above named, by their counselors, and designate the following additional portions of the record not heretofore designated by the appellant which appellees deem it necessary to be printed for the proper consideration of the matters in controversy by this Honorable Court:

[fol. 167] The additional portions of the record herein designated are:

1. The written opinion of the trial court.
2. The affidavit of witness H. Brown Cannon.

3. The affidavit of witness Clarence Frink.
4. The affidavit of witness A. T. McClintock.
5. The affidavit of witness Morris Robinson.
6. The affidavit of witness Wilbur F. Denious.
7. The affidavit of witness Simon J. Heller.

Wilbur F. Denious, Hudson Moore, A. J. Fowler, Ernest B. Fowler, Counselors for appellees.

[fol. 168] [File endorsement omitted.]

Endorsed on cover: File No. 31,719. Colorado D. C. U. S. Term No. 304. Foster Cline, as district attorney for the city and county of Denver, State of Colorado, appellant, vs. Frink Dairy Company, the Windsor Farm Dairy Company, the Climax Dairy Company. Filed February 24th, 1926. File No. 31,719.

SUBJECT INDEX

CASES CITED